

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DONALD DEBOSE, JR.,

No. C 14-5268 SI (pr)

Plaintiff,

**ORDER TO SHOW CAUSE RE.
CONTEMPLATED DISMISSAL**

v.

STATE OF CALIFORNIA; et al.,

Defendants.

Donald Debose, Jr., an inmate at San Quentin State Prison has filed this *pro se* prisoner's civil rights action. He also has applied to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 in the referenced case.

A prisoner may not bring a civil action *in forma pauperis* under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Section 1915(g) requires that this court consider prisoner actions dismissed before, as well as after, the statute's 1996 enactment. *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997).

For purposes of a dismissal that may be counted under § 1915(g), the phrase "fails to state a claim on which relief may be granted" parallels the language of Federal Rule of Civil Procedure 12(b)(6) and carries the same interpretation, the word "frivolous" refers to a case that is "of little weight or importance: having no basis in law or fact," and the word "malicious" refers to a case "filed with the 'intention or desire to harm another.'" *Andrews v. King*, 398 F.3d

1 1113, 1121 (9th Cir. 2005) (citation omitted). Only cases within one of these three categories
2 can be counted as strikes for § 1915(g) purposes, so the mere fact that Debose has filed several
3 cases does not alone warrant dismissal under § 1915(g). *See id.* Rather, dismissal of an action
4 under § 1915(g) should only occur when, "after careful evaluation of the order dismissing an
5 [earlier] action, and other relevant information, the district court determines that the action was
6 dismissed because it was frivolous, malicious or failed to state a claim." *Id.*

7 *Andrews* requires that the prisoner be given notice of the potential applicability of §
8 1915(g), by either the district court or the defendants, but also requires the prisoner to bear the
9 ultimate burden of persuasion that § 1915(g) does not bar pauper status for him. *Id.* *Andrews*
10 implicitly allows the court to *sua sponte* raise the § 1915(g) problem, but requires the court to
11 notify the prisoner of the earlier dismissals it considers to support a § 1915(g) dismissal and
12 allow the prisoner an opportunity to be heard on the matter before dismissing the action. *See id.*
13 at 1120. A dismissal under § 1915(g) means that a prisoner cannot proceed with his action as
14 a pauper under § 1915, but he still may pursue his claims if he pays the full filing fee at the
15 outset of the action.


16 Debose is now given notice that the court believes the following dismissals may be
17 counted as dismissals for purposes of § 1915(g): First, *Debose v. Bell*, N. D. Cal. Case No. C
18 05-2857 RMW, was dismissed for failure to state a claim upon which relief may be granted, and
19 the appeal from that decision was dismissed for failure to prosecute. Second, *Debose v.*
20 *Chappell*, N. D. Cal. Case No. C 12-4234 SI, was dismissed for failure to state a claim upon
21 which relief may be granted, and no appeal was taken. Third, *Debose v. Governor Brown*, N.
22 D. Cal. Case No. C 12-6169 SI, was dismissed for failure to state a claim, and the appeal from
23 that decision was dismissed for failure to prosecute. The court made its evaluation of these cases
24 based on the dismissal orders and docket sheets in them. *See Andrews*, 398 F.3d at 1120
25 (sometimes the docket records may be sufficient, and sometime the actual court files may need
26 to be consulted).

1 In light of these dismissals, and because Debose does not appear to be under imminent
2 danger of serious physical injury, he is ORDERED TO SHOW CAUSE in writing filed no later
3 than **January 16, 2015** why *in forma pauperis* should not be denied and this action should not
4 be dismissed pursuant to 28 U.S.C. § 1915(g). In the alternative to showing cause why the
5 action should not be dismissed, Debose may avoid dismissal by paying the full \$400.00 filing
6 fee by the deadline.

7 Plaintiff has requested that counsel be appointed to assist him in this action. A district
8 court has the discretion under 28 U.S.C. §1915(e)(1) to designate counsel to represent an
9 indigent civil litigant in exceptional circumstances. *See Wilborn v. Escalderon*, 789 F.2d 1328,
10 1331 (9th Cir. 1986). This requires an evaluation of both the likelihood of success on the merits
11 and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal
12 issues involved. *See id.* Neither of these factors is dispositive and both must be viewed together
13 before deciding on a request for counsel under § 1915(e)(1). Here, exceptional circumstances
14 requiring the appointment of counsel are not evident. The request for appointment of counsel
15 is DENIED. (Docket # 3.)

16 IT IS SO ORDERED.

17 Dated: December 15, 2014



SUSAN ILLSTON
United States District Judge